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YUVANESWARAN RAJOO v. PP

FEDERAL COURT, PUTRAJAYA
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
BALIA YUSOF WAHI FCJ
TENGKU MAIMUN TUAN MAT FCJ
B ABANG ISKANDAR FCJ
NALLINI PATHMANATHAN FCJ
[CRIMINAL APPEAL NO: 05(M)-79-04-2018(B)]
4 JULY 2019

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in dangerous drugs – Whether accused person had custody and control of drugs – Whether trial judge made inference of trafficking solely on quantity of drugs – Whether trial judge invoked double presumptions under ss. 37(d) and 37(da) of Dangerous Drugs Act 1952 or made affirmative finding of direct trafficking under*
D *s. 2 – Whether trial judge erred in invoking both ss. 37(d) and 37(da) – Whether accused person innocent carrier*

CRIMINAL PROCEDURE: *Appeal – Trafficking in dangerous drugs – Whether trial judge erred in invoking both ss. 37(d) and 37(da) of Dangerous Drugs Act 1952 ('DDA') – Whether accused person had custody and control of drugs – Whether trial*
E *judge made inference of trafficking solely on quantity of drugs – Whether trial judge invoked double presumptions under ss. 37(d) and 37(da) or made affirmative finding of direct trafficking under s. 2 of DDA – Contradictions in evidence – Whether caused serious miscarriage of justice to accused person – Whether accused person innocent carrier – Whether conviction of accused person safe*

F Customs officer, Ummi Kalsom ('PW10'), together with Mohd Fairuz, were on duty at the customs scanning machine at the Kuala Lumpur International Airport ('KLIA'). On his arrival in a flight from Colombo, Sri Lanka, the appellant was directed by PW10 to scan his luggage bag ('P9'). When P9 was scanned, PW10 saw a green image around the bag. Mohd Fairuz then
G instructed the appellant to open P9. When it was opened, Mohd Fairuz found some saree clothes and slippers inside. The appellant was asked to empty P9. Mohd Fairuz then conducted a physical examination of P9 where he felt something at the sides of the bag. P9 was scanned once again. The green image was still present. On the instruction of the senior customs officer,
H PW7, who was informed of the suspicious image in P9, Mohd Fairuz opened two screws of P9. When the screws were removed, a white powdery substance, suspected to be dangerous drugs, was found hidden in the frame of P9. The search and the discovery of the drugs were in the presence of the customs officers Wan Othaman ('PW6') and PW7. The white powdery
I substance was analysed by the chemist and was confirmed to be 2136.7g of methamphetamine, which is listed under the First Schedule of the Dangerous Drugs Act 1952 ('DDA'). The appellant was thus charged under s. 39B(1)(a)

of the DDA, an offence punishable under s. 39B(2) of the DDA. The trial judge found the prosecution had proven a *prima facie* case against the appellant and hence, called upon the appellant to enter his defence. In his defence, the appellant stated that he had befriended one Ganesh who offered him a job to bring back a luggage containing saree clothes from India and that one Jacy would be making the travel arrangements for the appellant. The appellant followed the instructions on the travel arrangements and once in India, a man and a woman handed him P9 and upon inspection, the appellant found it to contain saree material. The appellant then flew to Colombo, Sri Lanka on Jacy's instruction and from Colombo, he flew to Malaysia. The gist of the appellant's defence was that he was an innocent carrier. The trial judge found the appellant had not rebutted the presumption of possession under s. 37(d) of the DDA on a balance of probabilities and had not raised a reasonable doubt on the prosecution's case. The appellant was therefore found guilty as charged and sentenced to death. The appellant's appeal to the Court of Appeal was dismissed and hence, the present appeal. It was submitted for the appellant that the Court of Appeal erred: (i) in its finding that there was no invocation of double presumptions by the High Court; (ii) in accepting the statement of the arresting officer, P68, at its face value as its weight and credibility had not been challenged; and (iii) in agreeing with the High Court that the appellant was not an innocent carrier as he had deliberately shut his eyes to the obvious.

Held (dismissing appeal; affirming conviction and sentence)
Per Tengku Maimun Tuan Mat FCJ (for the majority):

(1) The trial judge did not make an inference of trafficking solely on the quantity of the drugs, in that, the trial judge did not invoke both ss. 37(d) and 37(da) of the DDA at the end of the prosecution's case but had, in fact, invoked ss. 37(d) and 2 of the DDA. In making an affirmative finding of direct trafficking under s. 2 of the DDA, the judge had regard to the evidence of the boarding pass and luggage tag, which were in the appellant's name and relied on the undisputed evidence that the appellant flew into KLIA from Colombo and was carrying, or transporting, the drugs in P9 from Sri Lanka to Kuala Lumpur. The finding was consistent with the trial judge's conclusion, at the end of the defence case, that the appellant failed to rebut the presumption under s. 37(d). There was no mention of the fact that the appellant failed to rebut the presumption under s. 37(da) of the DDA. Hence, the trial judge did not fall into error by invoking both ss. 37(d) and 37(da) of the DDA. (paras 36 & 37)

(2) The grievance of the appellant on the contradictions in the evidence of PW10 and the statement of the arresting officer in P68, although overlooked by the High Court, were considered by the Court of Appeal that concluded that the issues raised were bereft of any merit. The

discovery of the drugs in P9 was admitted to by the appellant in his cautioned statement, D69, and therefore, whether PW10 was or was not present during the first and the second inspection, had no material significance. Likewise, the amendment to the body numbers of the customs officers mentioned in P68 and the contradiction on who was the recording officer for the search list would not be material. Further, the issues raised in respect of the weight and credibility of P68, and the amendments made thereto, by the investigating officer also did not negate the fact that the drugs were found in P9. Therefore, there was no prejudice or serious miscarriage of justice to the appellant arising from the so-called contradictions in the evidence as the material fact was whether drugs were found in P9, and not whether PW10 was present or otherwise during the search. Based on the evidence, including that of the cautioned statement, only the appellant, and no one else, had custody and control of P9. (paras 38-41)

(3) Although the appellant had exposed the roles of Ganesh and Jacy at the earliest available opportunity, there was no appealable error on the part of the High Court and the Court of Appeal in findings that the appellant had failed to rebut the presumption of knowledge under s. 37(d) of the DDA and had failed to raise a reasonable doubt on the prosecution's case. Further, the way the travel arrangements and delivery of P9 were made, appeared to be clandestine. If the purpose of the appellant's travel to India was truly to collect the saree materials, having collected them, why the need for the appellant to then travel to Colombo? The trial judge was correct in finding that the appellant was not an innocent carrier. The circumstances of the appellant's travel ought to have aroused his suspicion on the genuineness of what was informed to him by Ganesh. Therefore, the conviction was safe. (paras 43, 48 & 49)

Per Abang Iskandar FCJ (dissenting):

(1) The Deputy Public Prosecutor ('DPP') stated that para. [22] of the High Court judgment encapsulated the trial judge's findings of both the crucial elements of possession and trafficking in the charge. Based on para. [22] of the judgment of the High Court, there was a determination on the element of possession and the appellant failed to rebut the same. However, to go beyond that, in saying that the appellant had also failed to rebut trafficking, would be reading words into the paragraph, where such words were absolutely and conspicuously absent. (paras 65-66)

(2) Possession and trafficking, although proximate and appearing in the same charge under s. 39B(1) of the DDA are, however, not identical. Each needed and deserved to be considered distinctly, in light of the evidence as adduced before the court. The judge must first determine whether the presumption of possession under s. 37(d) of the DDA has

been rebutted by the accused person on the balance of probabilities. If the presumption of possession is rebutted, the accused person must be acquitted. However, if the accused person fails to rebut the presumption of possession, the judge would have to determine from the evidence adduced, whether the accused person has rebutted the presumption of trafficking, also on the balance of probabilities. Only in the event that the accused person has failed to rebut the presumption of trafficking would the trial judge be justified in convicting the accused person on the drug trafficking charge. Nothing short of that would suffice. (paras 68 & 83)

(3) The trial judge was correct in concluding that there was custody or control of the container that contained the impugned drugs attributable to the appellant. Hence, the presumption of possession under s. 37(d) of the DDA invoked, in which case, the factum of knowledge of the nature of the drugs was also presumed against the appellant. On evidence, it was ruled that the appellant failed to rebut that presumption of possession of the impugned drugs on the balance of probabilities. Therefore, the prosecution had successfully proven the offence of possession against the appellant. (para 71)

(4) The literal reading of para. [22] showed that there was no reference to s. 37(da) of the DDA and neither was the word 'trafficking' present in the said paragraph. Instead, an express reference was made to the phrase 'to rebut the presumption of knowledge under s. 37(d) of the DDA invoked by the prosecution on the balance of probabilities.' The trial judge had committed a serious misdirection by way of non-direction in failing to address his mind on the issue of whether the evidence of the appellant had created any reasonable doubt on the element of trafficking by him in the impugned drugs. The omission was fatal to the conviction for the offence of trafficking under s. 39B of the DDA and such a conviction could not, in law, be allowed to stand. (paras 75 & 79)

(5) It did not matter whether the factum of trafficking was one that was presumed as a matter of invoking the presumption under s. 37(da) of the DDA or that it was to be proven by the prosecution by way of trafficking as defined under s. 2 of the DDA. In the event the accused failed to rebut the presumed possession under s. 37(d) of the DDA, the trial judge should not straight away convict him on a charge for drug trafficking. Instead, it was incumbent on the judge to consider whether, on the evidence as adduced by the accused, the latter had created a reasonable doubt in the element of trafficking as defined under s. 2 of the DDA. The failure on the part of the trial judge to consider the

defence evidence pertaining to rebutting the presumption of trafficking amounted to a denial to appreciate a very crucial part of the appellant's defence. (paras 80 & 81)

(6) A failure to comply and adhere to undertake the two-tier exercise in deserving cases in a drug trafficking charge would constitute a serious miscarriage of justice. The trial judge did not view the evidence from all angles, especially with respect to the element of trafficking, which formed a critical part of the charge which, on conviction, would attract the mandatory death penalty. The appellant's chance to be acquitted of the trafficking charge had thereby been denied. (paras 84 & 85)

Bahasa Malaysia *Headnotes*

Pegawai kastam, Ummi Kalsom ('PW10'), bersama-sama dengan Mohd Fairuz, bertugas di mesin pengimbas kastam di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA'). Setibanya dari penerbangan dari Colombo, Sri Lanka, perayu diarahkan oleh PW10 untuk mengimbas bagasinya ('P9'). Apabila P9 diimbas, PW10 melihat imej berwarna hijau pada keliling beg. Mohd Fairuz kemudian mengarahkan perayu membuka P9. Apabila dibuka, Mohd Fairuz menjumpai kain-kain sari dan selipar di dalamnya. Perayu disuruh mengosongkan P9. Mohd Fairuz kemudian melakukan pemeriksaan fizikal pada P9 dan merasakan sesuatu di bahagian tepi beg itu. P9 diimbas sekali lagi. Imej hijau itu masih kelihatan. Atas arahan pegawai kanan kastam, PW7, yang dimaklumkan tentang imej yang meragukan tersebut dalam P9, Mohd Fairuz membuka dua skru P9. Apabila skru dibuka, bahan serbuk putih, yang disyaki dadah berbahaya, didapati disembunyikan dalam rangka P9. Carian dan penemuan dadah tersebut adalah dengan kehadiran pegawai kastam Wan Othaman ('PW6') dan PW7. Bahan serbuk putih tersebut dianalisis oleh ahli kimia dan disahkan sebagai 2136.7g methamphetamine, yang tersenarai bawah Jadual Pertama Akta Dadah Berbahaya 1952 ('ADB'). Perayu, oleh itu, dipertuduh bawah s. 39B(1)(a) ADB, satu kesalahan yang boleh dihukum bawah s. 39B(2) ADB. Hakim bicara mendapati pendakwaan telah membuktikan kes *prima facie* terhadap perayu dan dengan itu, memanggil perayu membela diri. Dalam pembelaannya, perayu menyatakan dia berkenalan dengan seorang bernama Ganesh yang menawarkan pekerjaan membawa balik bagasi yang mengandungi kain-kain sari dari India dan seorang bernama Jacy akan membuat aturan perjalanan untuk perayu. Perayu mengikuti arahan perjalanan tersebut dan semasa di India, seorang lelaki dan wanita menyerahkan kepadanya P9 dan selepas diperiksa, perayu mendapati beg itu mengandungi kain-kain sari. Perayu kemudian menaiki penerbangan ke Colombo, Sri Lanka, atas arahan Jacy dan dari Colombo, dia ke Malaysia. Inti pati pembelaan perayu adalah bahawa dia pembawa tidak bersalah. Hakim bicara mendapati perayu gagal mematahkan anggapan milikan bawah

s. 37(d) ADB atas imbangan kebarangkalian dan tidak berjaya membangkitkan keraguan munasabah atas kes pendakwaan. Perayu, oleh itu, didapati bersalah seperti dituduh dan dijatuhkan hukuman mati. Rayuan perayu ke Mahkamah Rayuan ditolak dan dengan itu, rayuan ini. Dihujahkan untuk pihak perayu bahawa Mahkamah Rayuan terkhilaf (i) dalam dapatannya bahawa tiada anggapan berganda dibangkitkan oleh Mahkamah Tinggi; (ii) apabila menerima kenyataan pegawai yang menangkap, P68, secara zahir kerana berat dan kebolehpercayaannya tidak dicabar; dan (iii) apabila bersetuju dengan Mahkamah Tinggi bahawa perayu bukan pembawa tidak bersalah kerana sengaja tidak mengendahkan sesuatu yang nyata.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman) Oleh Tengku Maimun Tuan Mat HMP (keputusan majoriti):

(1) Hakim bicara tidak membuat inferens pengedaran semata-mata berdasarkan kuantiti dadah, iaitu, hakim bicara tidak membangkitkan kedua-dua ss. 37(d) dan 37(da) ADB di akhir kes pendakwaan tetapi sebenarnya membangkitkan ss. 37(d) dan 2 ADB. Apabila membuat dapatan afirmatif pengedaran terus bawah s. 2 ADB, hakim mempertimbangkan keterangan pas masuk dan tag bagasi, yang tertera nama perayu dan bersandar pada keterangan yang tidak dipertikaikan bahawa perayu menaiki penerbangan ke KLIA dari Colombo dan membawa atau memindahkan dadah dalam P9 dari Sri Lanka ke Kuala Lumpur. Dapatan itu konsisten dengan keputusan hakim bicara di akhir kes pembelaan bahawa perayu gagal mematahkan anggapan bawah s. 37(d). Tiada pernyataan tentang fakta bahawa perayu gagal mematahkan anggapan bawah s. 37(da) ADB. Oleh itu, hakim bicara tidak terkhilaf dalam membangkitkan kedua-dua ss. 37(d) dan 37(da) ADB.

(2) Kilanan perayu tentang percanggahan dalam keterangan PW10 dan kenyataan pegawai menangkap dalam P68, walaupun terlepas pandang oleh Mahkamah Tinggi, telah dipertimbangkan oleh Mahkamah Rayuan yang memutuskan bahawa isu-isu yang dibangkitkan tidak bermerit. Penemuan dadah dalam P9 diakui oleh perayu dalam kenyataan beramarannya, D69, dan oleh itu, sama ada PW10 ada atau tiada semasa pemeriksaan pertama dan kedua dijalankan, tidak penting. Seperti itu juga, pindaan pada jumlah pegawai kastam yang dinyatakan dalam P68 dan percanggahan tentang siapa pegawai yang merekodkan untuk senarai carian juga tidak penting. Selanjutnya, isu-isu yang dibangkitkan berkaitan berat dan kebolehpercayaan P68 dan pindaan-pindaan yang dibuat padanya oleh pegawai penyiasat juga tidak mendalihkan fakta bahawa dadah tersebut dijumpai dalam P9. Oleh itu, tiada prejudis atau salah laksana keadilan terhadap perayu berbangkit daripada percanggahan-percanggahan yang dikatakan dalam keterangan kerana

fakta penting adalah sama ada dadah dijumpai dalam P9, dan bukan sama ada PW10 hadir atau tidak semasa carian dilakukan. Berdasarkan keterangan, termasuk kenyataan beramaran, hanya perayu dan bukan orang lain yang mempunyai kawalan dan jagaan P9.

(3) Walaupun perayu telah mendedahkan peranan Ganesh dan Jacy dalam peluang terawal, tiada kekhilafan yang boleh dirayu pada pihak Mahkamah Tinggi dan Mahkamah Rayuan apabila mendapati perayu gagal mematahkan anggapan pengetahuan bawah s. 37(d) ADB dan gagal membangkitkan keraguan munasabah terhadap kes pendakwaan. Selanjutnya, cara perjalanan diatur dan penghantaran P9 dibuat, kelihatan dibuat secara rahsia. Jika tujuan perjalanan perayu ke India hanya untuk mengambil kain sari, dan selepas mengambilnya, mengapa perayu perlu ke Colombo? Hakim bicara betul dalam dapatan beliau bahawa perayu bukan pembawa tidak bersalah. Hal keadaan perjalanan perayu wajar menimbulkan keraguan tentang kesahihan apa-apa yang dimaklumkan kepadanya oleh Ganesh. Oleh itu, sabitan tersebut selamat.

Oleh Abang Iskandar HMP (menentang):

(1) Timbalan Pendakwa Raya ('TPR') menghujahkan bahawa perenggan [22] penghakiman Mahkamah Tinggi menyatakan dapatan hakim bicara tentang kedua-dua elemen penting milikan dan pengedaran dalam pertuduhan. Berdasarkan perenggan [22] penghakiman Mahkamah Tinggi, terdapat penentuan tentang unsur milikan dan bahawa perayu gagal mematahkannya. Walau bagaimanapun, untuk menyatakan selanjutnya bahawa perayu juga gagal mematahkan pengedaran, bermaksud memasukkan perkataan dalam perenggan itu, apabila, perkataan-perkataan itu sama sekali dan jelas, tidak dimasukkan.

(2) Milikan dan pengedaran, walaupun berkaitan dan didapati dalam pertuduhan sama bawah s. 39B(1) ADB, walau bagaimanapun, tidak serupa. Setiap satu perlu dan mesti dipertimbangkan secara berasingan, berdasarkan keterangan yang dikemukakan di mahkamah. Pertama sekali, hakim perlu menentukan sama ada anggapan milikan bawah s. 37(d) ADB dipatahkan oleh tertuduh atas imbangan kebarangkalian. Jika anggapan milikan telah dipatahkan, tertuduh perlu dilepaskan. Walau bagaimanapun, jika tertuduh gagal mematahkan anggapan milikan, hakim perlu menentukan daripada keterangan yang dikemukakan, sama ada tertuduh telah mematahkan anggapan pengedaran, juga atas imbangan kebarangkalian. Hanya jika perayu gagal mematahkan anggapan pengedaran, hakim bicara berjustifikasi dalam mensabitkan tertuduh atas pertuduhan pengedaran dadah. Apa-apa yang kurang daripada itu, tidak akan mencukupi.

(3) Hakim bicara betul apabila memutuskan bahawa terdapat kawalan dan jagaan bekas yang mengandungi dadah yang dipersoalkan berkait dengan perayu. Oleh itu, anggapan milikan bawah s. 37(d) ADB dibangkitkan, dan dengan itu, fakta pengetahuan tentang sifat dadah juga dibuat anggapan terhadap perayu. Berdasarkan keterangan, diputuskan bahawa perayu gagal mematahkan anggapan milikan dadah yang dipersoalkan atas imbangan kebarangkalian. Oleh itu, pihak pendakwaan berjaya membuktikan kesalahan milikan terhadap perayu.

(4) Bacaan harfiah perenggan [22] menunjukkan tiada rujukan pada s. 37(da) ADB dan juga tiada perkataan 'pengedaran' dalam perenggan itu, sebaliknya, rujukan jelas dibuat untuk frasa 'untuk mematahkan anggapan pengetahuan bawah s. 37(d) ADB yang dibangkitkan oleh pendakwaan atas imbangan kebarangkalian.' Hakim bicara melakukan salah arahan serius tanpa arahan apabila gagal mempertimbangkan isu sama ada keterangan perayu membentuk apa-apa keraguan munasabah atas elemen pengedaran dadah yang dipersoalkan. Ketinggalan itu memudaratkan sabitan untuk kesalahan bawah s. 39B ADB dan sabitan sedemikian tidak boleh, dari segi undang-undang, dikekalkan.

(5) Tidak penting sama ada fakta pengedaran dianggap sebagai satu perkara dengan membangkitkan anggapan bawah s. 37(da) ADB atau perlu dibuktikan oleh pihak pendakwaan dengan pengedaran seperti yang ditakrifkan bawah s. 2 ADB. Jika tertuduh gagal mematahkan anggapan milikan bawah s. 37(d) ADB, hakim bicara tidak sepatutnya terus mensabitkan tertuduh atas pertuduhan pengedaran dadah. Sebaliknya, hakim wajib mempertimbangkan sama ada, atas keterangan yang dikemukakan oleh tertuduh, tertuduh membentuk keraguan munasabah dalam unsur pengedaran seperti yang ditakrif bawah s. 2 ADB. Kegagalan hakim bicara mempertimbangkan keterangan pembelaan berkaitan dengan pematahan anggapan pengedaran bermaksud penafian untuk mempertimbangkan bahagian penting pembelaan perayu.

(6) Kegagalan mematuhi ujian dua peringkat dalam kes-kes yang memerlukan berkaitan pertuduhan pengedaran dadah akan membentuk salah laksana keadilan. Hakim bicara tidak mempertimbangkan keterangan dari semua sudut, khususnya berkaitan dengan elemen pengedaran, yang membentuk bahagian penting pertuduhan, yang, atas sabitan, akan menjurus pada hukuman mati mandatori. Peluang perayu untuk dilepaskan daripada pertuduhan pengedaran, oleh itu, telah dinafikan.

Case(s) referred to:
AEG Carapiet v. AY Derderian AIR 1961 Cal 359 ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Browne v. Dunn (1893) 6 R 67 ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Soorya Kumar Narayanan & Anor v. PP [2012] 9 CLJ 141 FC ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, s. 92(1)
Criminal Procedure Code, ss. 112, 182A
Dangerous Drugs Act 1952, ss. 2, 6, 12(2), 37(d), (da), 37A, 39B(1), (2), 39A(2), First Schedule
Evidence Act 1950, s. 32(1)(i)

For the appellant - N Sivananthan & Jasmine Cheong; M/s Sivananthan
For the respondent - Norinna Bahadun; DPP

[Editor's note: For the Court of Appeal judgment, please see Yuvaneswaran Rajoo v. PP [2018] 1 LNS 588 (affirmed)
Appeal from High Court, Shah Alam; Criminal Trial No: 45A-39-04-2014 (affirmed).]

Reported by S Barathi

JUDGMENT

Tengku Maimun Tuan Mat FCJ (majority):

[1] The appellant was convicted and sentenced to death by the High Court on the following charge:

> Bahawa kamu pada 25 Oktober 2013, lebih kurang jam 7.15 pagi, di Cawangan Pemeriksaan Penumpang 1 (CPP1), Balai Ketibaan Antarabangsa, Lapangan Terbang Kuala Lumpur (KLIA), di dalam daerah Sepang, di dalam negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 2,137 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The appellant's appeal to the Court of Appeal was unanimously dismissed, hence his appeal to this court. After hearing arguments of learned counsel and learned DPP and having perused the appeal records, we dismissed the appeal by a majority decision of 3:2. Justice David Wong Dak Wah, and Justice Balia Yusof bin Hj Wahi were with me while Justice Nallini Pathmanathan and Justice Abang Iskandar bin Abang Hashim dissented. This is the judgment of the majority.

The Prosecution's Case

[3] The facts as narrated by the High Court are as follows. On 25 October 2013, at about 7.15am, customs officer Ummi Kalsom bte Dasuki Gopeng (PW10), together with Mohd Fairuz bin Johar were on duty at the customs scanning machine at the Kuala Lumpur International Airport ("KLIA").

PW10 directed the accused, who arrived on a flight from Colombo, Sri Lanka to scan his luggage bag ("P9"). When P9 was scanned, PW10 saw a green image around the bag. Mohd Fairuz then instructed the appellant to open P9. When it was opened, Mohd Fairuz found some saree clothes and slippers inside). The appellant was asked to empty P9. Mohd Fairuz then conducted a physical examination of P9 where he felt something at the sides of the bag. P9 was scanned once again. The green image was still present. A senior customs officer, Norazoha bin Salim (PW7) was informed of the suspicious image in P9.

[4] PW7 instructed Mohd Fairuz to examine the luggage bag at the counter. At counter D, Mohd Fairuz opened two screws of P9. When the screws were removed, Mohd Fairuz found white powdery substance, suspected to be dangerous drugs, hidden in the frame of P9. The search and the discovery of the drugs were in the presence of customs officer of the KLIA office, Wan Othaman bin Wan Daud ("PW6") and PW7.

[5] Upon analysis by the chemist, Dr. Saravana Kumar a/l Jayaram (PW4), the white powdery substance was confirmed to be 2136.7g of methamphetamine. Methamphetamine is listed under the First Schedule of the Dangerous Drugs Act 1952 ("the Act").

[6] Mohd Fairuz, the arresting officer did not testify in the trial. He passed away, but his statement ("P68") was admitted as evidence under s. 32(1)(i) of the Evidence Act 1950.

Findings At The End Of Prosecution's Case

[7] In evaluating the case of the prosecution, the learned Judicial Commissioner ("JC") took into account the evidence of PW4, PW6, PW7, PW10 and P68.

[8] On the nature and weight of the drugs, His Lordship accepted the evidence of PW4. On possession, the learned JC held that the evidence had proved that the appellant was having custody and control of the bag and with the aid of presumption under s. 37(d) of the Act, found that the appellant had knowledge of the drugs hidden in P9.

[9] As for the element of trafficking, His Lordship found that the prosecution had proved that the appellant was trafficking in dangerous drugs under s. 2 of the Act, having considered the fact that the appellant was travelling from Colombo to KLIA. In addition, His Lordship took into consideration the fact that the amount of the drugs was so huge that it could not be for self-consumption by the appellant.

[10] Having found that the prosecution had proved a *prima facie* case against the appellant, the learned JC called upon the appellant to enter his defence.

The Defence

[11] The appellant gave evidence under oath and his evidence may be summarised as follows. The appellant had befriended one Ganesh sometime in the year 2012. In 2013, through a telephone conversation, Ganesh had offered him a job to bring back a luggage containing saree clothes from India. According to the appellant, Ganesh told him that Ganesh could not travel to India because of travel insurance issue. For the job to bring back the sarees from India, the appellant was promised RM800. Ganesh also informed the appellant that one Jacy (the learned judge referred to as Jessy) will be making the travel arrangements for the appellant to go to India.

[12] On 19 October 2013, at about 4pm, the appellant received a call from Jacy instructing the appellant to collect the plane tickets from a man at IOI Mall, Puchong. The appellant waited at a restaurant behind the mall where a man approached him and handed him the tickets. The appellant did not know who the man was. The appellant was to fly to Chennai on the same day at 6.30pm. For the expenses in India, Ganesh had banked in RM1,800 into the appellant's account.

[13] On arrival in Chennai on 19 October 2013, the appellant was asked to fly to New Delhi. In New Delhi, the appellant stayed at Hotel Shelton as suggested by Jacy. The appellant stayed at the hotel from the date of his arrival until 23 October 2013.

[14] On 23 October 2013, the appellant received a phone call requesting him to come to the hotel lobby. At the lobby, the appellant saw a man and a woman who handed him P9. Upon inspection of the luggage, the appellant found it to contain saree materials. The appellant took the said luggage and proceeded to take a flight from New Delhi to Colombo, Sri Lanka, based on instructions from Jacy. The flight ticket was received from Jacy *via* email. On 24 October 2013, the appellant flew back to Malaysia. He arrived at KLIA on 25 October 2013.

[15] It was the appellant's defence that he had no knowledge of the drugs found in P9. His defence was consistent with his cautioned statement recorded on 28 October 2013, wherein he said that he had no knowledge of the drugs in P9. The gist of the appellant's defence was that he was an innocent carrier.

[16] The learned JC found that the appellant had not rebutted the presumption of possession under s. 37(d) of the Act on a balance of probabilities and that the appellant had not raised a reasonable doubt on the prosecution's case. His Lordship gave the following reasons for his conclusion at para. [22] of his grounds of judgment:

1) In the first place, the accused could not be that naive to travel to India on all expenses paid by Ganesh just to carry back P9 *(sic)* containing saree materials which were not proven to be costly that it outweighs the expenses spent and payment of RM1,800.00 made to the accused. If it were just to bring back those materials, courier service would suffice which would cost less to Ganesh. The only inference is that the accused knew what he was doing to carry an important consignment worth more in value than the saree materials.

2) The way the travel arrangements and delivery of P9 were made appeared to be clandestine. The accused's version only proved that he was actually involved in the drug transaction. The perpetuators Ganesh, Jessy, and the others were obviously careful in covering their tracks and the accused in such circumstances which were suspicious should be fully aware of it. His participation in the transaction clearly proved that he had knowledge of the drugs that he was carrying in P9. He was not an innocent carrier.

3) In such suspicious circumstances, the accused should examine P9 carefully and not just casually. With the weight of P9 to be unnecessarily heavy, the accused should have realised something amiss with P9. Yet he took it and travelled with it back to KLIA. Moreover P9 was delivered to the accused by two strangers in New Delhi. Hence the accused was guilty of wilful blindness and as such he is presumed to have knowledge of the drugs in P9. Having said that, since the drugs were well concealed in P9, the inference is that it was concealed with the knowledge of the accused and the saree materials were just used as a camouflage. The other indication that the accused had knowledge of the drugs was his reaction to willingly by *(sic)* settle any customs duties when he was confronted by PW10 and Mohd Fairuz bin Johar when they tested him by telling him there were customs duty imposed on the saree materials. The accused's reaction as such is an indication that he wanted to quickly pass through the customs without the drugs being detected.

4) The names such as Ganesh, Jessy and Ganesh Travels could not be verified by the prosecution. The telephone numbers given by the accused/or found in his handphone on these characters were all registered in the names of others. It is therefore doubtful whether these characters existed as claimed by the accused.

[17] The appellant was therefore found guilty as charged and sentenced to death.

[18] Aggrieved by the decision of the High Court, the appellant appealed to the Court of Appeal, where he raised the following three issues:

(i) that the learned JC committed an error of law in invoking double presumptions under s. 37(d) and s. 37(da) of the Act;

(ii) that the learned JC did not undertake a maximum evaluation of the evidence adduced by the prosecution; and

(iii) that the learned JC failed to appreciate the appellant's defence of innocent carrier in its totality.

Findings Of The Court Of Appeal

[19] On the first issue, the Court of Appeal found that the learned JC relied on the statutory presumption under s. 37(d) to find knowledge of the impugned drugs concealed in P9 and that the learned JC did not rely on the statutory presumption under s. 37(da) of the Act to prove the element of trafficking. Instead, the learned JC had relied on direct trafficking under s. 2 of the Act.

[20] As regards the second issue, the appellant raised the following complaints before the Court of Appeal:

(i) that the learned JC failed to consider that the prosecution had led two sets of evidence; and

(ii) that the learned JC failed to critically evaluate the weight and creditworthiness to be attached to P68.

[21] While the Court of Appeal agreed with the appellant that there were contradictions between the evidence of PW10 and P68 on who was present during the search and who wrote the search list, the Court of Appeal found that the contradictions were not material.

[22] In respect of the complaint that the learned JC failed to adequately consider the appellant's defence, the Court of Appeal found the issue bereft of any merit. The Court of Appeal found that the learned JC had duly and sufficiently considered the defence of the appellant. The Court of Appeal agreed with the High Court that the appellant was not an innocent carrier and "that the whole transaction as narrated by the appellant in his defence would, in the normal circumstances, capable of raising suspicion sufficient to put him on inquiry as to the legitimacy of the whole transaction".

[23] As such, the Court of Appeal dismissed the appeal and affirmed the conviction and sentence of the High Court.

Proceedings In The Federal Court

[24] Before us, learned counsel for the appellant submitted that the Court of Appeal erred in its findings that there was no invocation of double presumptions and in accepting the statement of the arresting officer, P68 at its face value as its weight and credibility had not been challenged. It was further submitted that the Court of Appeal erred in agreeing with the High Court that the appellant was not an innocent carrier as he had deliberately shut his eyes to the obvious.

[25] In arguing that double presumptions were invoked by the High Court, learned counsel made reference to the following passage in the learned JC's grounds of judgment:

> 12. As for the third ingredient of trafficking in the said drugs, the prosecution had proven that the accused was carrying or transporting P9 from Colombo, Sri Lanka to KLIA as direct trafficking under section 2 DDA meaning of trafficking. In addition, the amount of the drugs is so huge that it could not be used for self consumption by the accused. The only conclusion in view of the huge amount of the drug must be for the purpose of trafficking.

[26] In this respect, the Court of Appeal held that the learned judge's remark cannot be construed or equated with an invocation of the presumption of trafficking under s. 37(da). It was contended by learned counsel for the appellant that it was not necessary for the learned judge to expressly state reliance of s. 37(da) of the Act. The fact that an inference of trafficking was drawn teased on the quantity of the drug found, effectively amounted to a reliance on the presumption of trafficking as exemplified in the case of *Soorya Kumar Narayanan & Anor v. PP* [2012] 9 CLJ 141; [2013] 1 MLJ 11.

[27] On the second issue, while learned counsel conceded that the learned JC had correctly admitted the arresting officer's statement, P68 under s. 32(1)(i) of the Evidence Act 1950, he argued that the statement cannot be accepted at face value and that the weight and degree of reliance to be attached to P68 ought to be examined with the greatest caution. It was further argued for the appellant that the Court of Appeal erred in concluding that the contradictions were not material enough to occasion great injustice or prejudice to the appellant.

[28] Learned counsel highlighted that the learned trial judge had relied on the arresting officer's statement in P68 and PW10's evidence in finding that a substantive element ie, knowledge of the drugs in luggage P9 was established. The effect of this prejudicial evidence, according to learned counsel can be seen in the following excerpt of the grounds of judgment:

> The other indication that the accused had knowledge of the drugs was his reaction to willingly by *(sic)* settle any customs duties when he was confronted by PW10 and Mohd Fairuz bin Johar when they tested him by telling him there were customs duties imposed on the saree materials. The accused's reaction as such is an indication that he wanted to quickly pass through the customs without the drugs being detected.

[29] The other complaints raised in respect of the second issue concerned the location of PW10, ie, whether she was at counter D or scanning machine D during the first inspection of luggage P9 and whether PW10 was present during the second inspection at CPP1. This was because in P68, the arresting officer mentioned that PW7 had witnessed the second inspection of luggage

P9 but made no mention of the presence of PW10. The third complaint raised was in relation to the preparation of the search list. In P68, it was stated that the arresting officer was the recording officer for the search list, whereas PW10 insisted that she was the recording officer for the search list. It was further submitted for the appellant that the inaccuracy and unreliability of the arresting officer's statement was accentuated through the amendments sought to be made by the prosecution through the investigating officer Muhamad Ardy bin Ismail (PW13), which amendments included the amendments to the body number of the customs officers mentioned in P68.

[30] Learned counsel for the appellant contended that although PW13 was the recording officer of P68, PW13 was not entitled to unilaterally make amendments to the identity and inadvertently, the presence of the customs officers on the material day that was disputed by the defence. Learned counsel argued that the learned JC erred in allowing PW13 to unilaterally amend the statement, P68 and that such an amendment was illegal and a clear attempt by the prosecution to mislead the court which could lead to a serious miscarriage of justice considering that the charge against the appellant carries a capital punishment.

[31] In relation to the defence, it was argued for the appellant that Ganesh and Jacy were not fictitious characters and that the appellant did not deliberately shut his eyes to the obvious. Learned counsel contended that the learned JC and the Court of Appeal erred in failing to consider the phone forensics report ("P24") in relation to the existence of Ganesh and Jacy and that the findings of the courts below on the appellant's defence of innocent carrier was erroneous for the reasons *inter alia* that there was evidence that the weight of the luggage P9 was not unnecessarily heavy; the appellant had examined the luggage P9 carefully and not casually; Ganesh had reassured the appellant, that the luggage would only contain saree materials; and Ganesh had given an explanation as to the reason why Ganesh could not travel to India himself to collect the sarees.

Our Decision

[32] By Amendment Act A1457, the Act was amended to insert s. 37A which allows for the application of double presumptions. The amendment came into effect on 15 February 2014. The offence in the instant appeal was committed prior to the amendment to the Act. It was argued for the appellant that in breach of the principles propounded in *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273, the learned trial judge in the instant case had invoked double presumptions.

[33] With respect, we disagreed with learned counsel and we found the case of *Soorya Kumar*, distinguishable. In *Soorya Kumar*, at the close of the prosecution case, the trial judge found that the appellants had care and custody of the drugs and that upon reliance on the presumption under s. 37(d) of the Act, found that the appellants also had knowledge of the drugs. The trial judge went on to conclude that there was a *prima facie* case for the offence of trafficking based solely on the quantity of the drugs involved in the case. The main defence of the appellants was lack of knowledge of the drugs. The High Court rejected the appellants' version of events and convicted them of trafficking and sentenced them to death.

[34] On appeal to the Court of Appeal, the order of the High Court was affirmed. The appellants appealed to this court, where they contended that the trial judge had erred in relying on s. 37(d) of the Act for presumed knowledge and that it was erroneous for the trial judge to solely rely on the weight of the drugs seized to infer trafficking.

[35] This court allowed the appeal against conviction and sentence. It was held that on the facts and circumstances of the case, and in the absence of any other facts, the learned trial judge erred in making an inference of trafficking solely on the quantity and weight of the drugs found.

[36] The same cannot be said of the instant case. The learned trial judge did not make an inference of trafficking solely on the quantity of the drugs. Reading the grounds of judgment as a whole, we agreed with the Court of Appeal that the learned JC did not invoke both ss. 37(d) and 37(da) at the end of the prosecution's case but had in fact invoked s. 37(d) and s. 2 of the Act. In making an affirmative finding of direct trafficking under s. 2 of the Act, His Lordship had regard to the evidence of the boarding pass, exh. P47 and luggage tag, exh. P43 which were in the appellant's name and had relied on the undisputed evidence that the appellant flew into KLIA from Colombo and was carrying or transporting the drugs in P9 from Sri Lanka to Kuala Lumpur.

[37] The above finding was consistent with the learned trial judge's conclusion at the end of the defence case where His Lordship found that the appellant failed to rebut the presumption under s. 37(d). There was no mention of the fact that the appellant failed to rebut the presumption under s. 37(da) of the Act. Hence, we were not satisfied that the learned JC fell into error by invoking both s. 37(d) and 37(da) of the Act as envisaged in *Muhammed bin Hassan (supra)*.

[38] In respect of the second ground of appeal, the grievance of the appellant was on the contradictions in the evidence of PW10 and the statement of the arresting officer in P68, as stated above. These issues, although were overlooked by the High Court, were considered by the Court of Appeal (see paras. [29]-[37] of the grounds of judgment), where the Court of Appeal concluded that the issues raised were bereft of any merit.

[39] We found no compelling reason to disagree with the Court of Appeal. It must be noted that the discovery of the drugs in P9 was admitted to by the appellant in his cautioned statement, D69. Given this admission, whether PW10 was or was not present during the first and the second inspection, had no material significance. Likewise, the amendment to the body numbers of the customs officers mentioned in P68 and the contradiction on who was the recording officer for the search list would not be material when the appellant had given the following account in D69 on the discovery of the drugs which formed the subject matter of the charge:

> Sampai di KLIA, saya turun dari pesawat … Setelah lepas kaunter imigresen, saya pergi collect luggage. Luggage saya adalah satu beg troli. Apabila sampai di pemeriksaan kastam, saya masukkan luggage saya ke dalam mesin pengimbas. Pegawai yang bertugas di situ arahkan saya untuk pergi ke kaunter pemeriksaan. Saya diarahkan untuk buka beg tersebut dan keluarkan pakaian di dalam. Saya kemudian diarahkan untuk imbas sekali lagi beg tersebut. Pegawai di situ kemudian periksa beg itu dan saya nampak pegawai itu jumpa serbuk di bingkai beg itu. Saya kemudian diarahkan masuk ke dalam pejabat bersama beg saya. Saya bawa dua beg. Satu shoulder bag yang saya bawa dari Malaysia dan satu beg troli yang diberi kepada saya semasa di India. Serbuk dijumpai di dalam beg troli saya ...

[40] The same reasoning applies to the issues raised in respect of the weight and credibility of P68 and the amendments made thereto by the investigating officer. All those issues did not negate the fact that the drugs were found in P9, the luggage carried by the appellant from Colombo to Kuala Lumpur. We therefore failed to see any prejudice or serious miscarriage of justice to the appellant arising from the so-called contradictions in the evidence relating to who was present during the search and who prepared the search list, and from the acceptance by the learned JC of P68. The dispute on the officers present was irrelevant since the appellant himself did not dispute that the drugs were found in P9. Surely the material fact would be whether drugs were found in P9 and not whether PW10 was present or otherwise during the search.

[41] From the evidence adduced, including that of the cautioned statement, only the appellant and no one else had custody and control of P9. The learned JC was therefore correct to find as follows:

> The next ingredient that the prosecution had to prove is that the accused had possession of the said drugs. From the evidence of the prosecution witnesses … the accused was seen carrying the bag P9 containing the drugs. Such evidence clearly proved that the accused was having custody or control of the bag P9. The prosecution had also invoked the presumption of knowledge of the drugs under section 37(d) of the DDA and in the result, with the aid of the presumption, the prosecution had proven the accused had knowledge of the said drugs found in P9.

[42] Learned counsel for the appellant emphasised the fact that the appellant had exposed the roles played by Ganesh and Jacy as the real perpetrators at the first available opportunity ie, during the examination of P9 and during the recording of his cautioned statement and that throughout the appellant's cautioned statement, D69, the appellant had mentioned numerous times that Ganesh and Jacy had contacted him *via* telephone. Learned counsel further submitted that this fact is corroborated by the phone forensics report, P24 which shows an incoming text message from "Ganesh India" dated 18 October 2013 which reads "0103697305 Jaccy". According to learned counsel, P24 is a material piece of evidence in support of the existence of Ganesh and Jacy. Nevertheless, neither the High Court nor the Court of Appeal considered P24.

[43] With respect, whilst the appellant may have exposed the roles of Ganesh and Jacy at the earliest available opportunity, we found no appealable error on the part of the High Court and the Court of Appeal in finding that the appellant had failed to rebut the presumption of knowledge under s. 37(d) of the Act and had failed to raise a reasonable doubt on the prosecution's case.

[44] The evidence of the investigating officer, Mohamad Zyed bin Ibrahim (PW14) revealed the following:

(i) the phone number of Ganesh was registered under the name of Ravishankar a/l Shanmugam. A check with the Jabatan Pendaftaran Negara showed that Ravishankar a/l Shanmugam had since died;

(ii) the phone number of Ganesh India was registered under the name of Vemala a/p Gopal whose IC number had no records with Jabatan Pendaftaran Negara;

(iii) the phone number of Jacy showed that it belonged to one Segar a/l Balakrishnan. A statement was taken from Segar who informed PW14 that he did not know the appellant, Ganesh, Ganeson or Jacy.

[45] Investigations on Ganesh Travel produced similar results ie, none of the names stated by the appellant was known to the travel agency.

[46] Clearly this was not a case where no investigations were done on the phone numbers. On the contrary, investigations were done but the phone numbers did not lead the police to Ganesh or Jacy. In the circumstances, the learned JC could not be faulted when he said that:

> The names such as Ganesh, Jessy and Ganesh Travels could not be verified by the prosecution. The telephone numbers given by the accused/ or found in his handphone or) these characters were all registered in the names of others. It is therefore doubtful whether these characters existed as claimed by the accused.

[47] The learned JC had examined the defence and he gave, among others, the following reasons why wilful blindness applies in this case:

(i) the appellant could not have been too naive to travel on a full paid trip only to collect sarees when it could have been done in a cheaper manner by courier;

(ii) the manner in which the travel arrangements were done were clandestine;

(iii) the luggage P9 was delivered to the appellant by an unknown person; and

(iv) the names given by the appellant do not match the names registered on the phone numbers.

[48] We agreed with the learned JC that the way the travel arrangements and delivery of P9 were made appeared to be clandestine. The appellant's version was that he was asked by Ganesh to go to India to collect sarees for the Deepavali celebration. The flight tickets were given to him by a stranger where he had to travel on the very same day that the flight tickets were given to him. The appellant did not collect the sarees at any shop in India. Instead a stranger delivered P9 to the hotel lobby. If the purpose of the appellant's travel to India was truly to collect the saree materials, having collected them, why the need for the appellant to then travel to Colombo? On the facts of the case, the learned JC was correct to find that the appellant was not an innocent carrier. The circumstances of the appellant's travel ought to have aroused his suspicion on the genuineness of what was informed to him by Ganesh.

Conclusion

[49] We found no appealable error on the part of the High Court and the Court of Appeal to warrant our appellate intervention. On the totality of the evidence, we found the conviction safe. The appeal was therefore dismissed and we affirmed the conviction and sentence of the High Court which was upheld by the Court of Appeal.

Abang Iskandar FCJ (dissenting):

Brief Facts Of The Case

[50] On 25 October 2013 at about 7.15am, customs officer, Ummi Kalsom bte Dasuki Gopeng (PW10), was on duty at the customs scanning machine D at the KLIA Main Terminal Arrival Hall, together with customs officer, Mohd Fairuz bin Johar ("Fairuz"). They saw a passenger, who was later identified as Yuvaneswaran a/l Rajoo ("the appellant") walking towards them and that he was pulling a luggage bag (P9). They then stopped him and Fairuz directed the appellant to have P9 scanned.

[51] PW10 then scanned P9 and on the monitor, she saw a green image from the sides of the said bag. Fairuz then instructed the appellant to open P9 and found that it contained some saree cloths and slippers inside it. After that Fairuz ordered the appellant to empty the bag P9. Upon checking the sides of the bag P9, Fairuz found that there was something in the sides of the bag. The emptied bag P9 was once again scanned and the green image was still there.

[52] A senior customs officer, Norazoha bte Salim (PW7), was informed by PW10 about the discovery of the suspicious image in P9. PW7 directed Fairuz to examine the bag P9 at the counter D. At counter D, Fairuz opened two screws with a screwdriver from the handle of P9. When the screws were removed, some white powdery substance came out from the holes. PW7 then directed Fairuz and PW10 to bring the appellant and the bag P9 to Cawangan Pemeriksaan Penumpang 1 (CPP1) for further examination.

[53] At about 9.15am, after the Customs Enforcement Team arrived at the CPP1, Fairuz started examining the bag P9. PW10 witnessed the search by Fairuz and she took down notes of the search which were recorded in the search list.

[54] Fairuz removed the side wall of P9 from the bag by using the screw driver. Thereafter, customs officer, Wan Othman bin Wan Daud (PW6) who had also witnessed the search, tested the white powdery substance that had come out from the holes of the screws, using a test kit. It tested positive for methamphetamine. The gross weight of the wall of P9 together with its contents was 4.65kg.

[55] After the search on P9 was completed, Fairuz proceeded to lodge a police report on the incident. Thereafter, the investigating officer Muhammad Ardy bin Ismail (PW13) arrived and the appellant and P9 together with the drugs exhibits were handed over to PW13 for further action.

[56] Dr. Saravana Kumar a/l Jayaram (PW4) had analysed the powdery substances found in the side wall of the bag P9 and confirmed that they were methamphetamine with a total weight of 2,137.6g. PW4 also confirmed in his report, that methamphetamine is listed as a dangerous drug under the First Schedule of the Dangerous Drugs Act 1952 ("DDA 1952"). PW4's chemist report was tendered and marked as P17.

[57] Before the case started for trial, Fairuz had passed away on 9 March 2014 in a road traffic accident. The prosecution tendered his death certificate as P57. The statement given by Fairuz under s. 112 of the Criminal Procedure Code was admitted in evidence as P68 under s. 32(1)(i) of the Evidence Act 1950.

[58] It was not disputed that the appellant flew into KLIA from Colombo, Sri Lanka, on 25 October 2013 as evinced from the boarding pass (P47), the baggage check-in (P43) and the flight manifest (P63).

Proceedings In The High Court And At The Court Of Appeal

[59] At the High Court, the appellant was charged for an offence of drug trafficking, under s. 39B(1) of DDA 1952. After a full trial, he was found guilty, convicted and sentenced to suffer the mandatory death penalty.

[60] Aggrieved with the conviction and sentence, the appellant appealed to the Court of Appeal. The Court of Appeal had unanimously dismissed the appellant's appeal.

The Appeal Before Us

[61] We heard this appeal by the appellant against the conviction and sentence by the High Court which was affirmed by the Court of Appeal. After hearing the respective parties, this court had, by majority, dismissed the appellant's appeal.

[62] At the end of the appeal, our learned brothers Justice David Wong Dak Wah and Justice Balia Yusof Wahi and learned sister Justice Tengku Maimun Tuan Mat had decided that this appeal must be dismissed and that the conviction and the sentence under s. 39B(1) and s. 39B(2) of the DDA 1952 respectively, be affirmed. They had so decided.

[63] On the other hand, my learned sister Justice Nallini Pathmanathan and I were of the considered view that such conviction and sentence could not be allowed to stand. We had therefore allowed this appeal and substituted it with a conviction under s. 12(2) and sentence under s. 39A(2) respectively, of the DDA 1952. Learned Justice Nallini had read my judgment in draft and she had indicated to me her agreement with it and that it shall constitute the judgment of the minority. As such, what ensues below, would encapsulate the reasons as to why we had so decided the way we did.

Our Deliberations

[64] In essence, we had no difficulty in agreeing with the learned Deputy Public Prosecutor ("DPP") that the learned trial judge was correct in calling for the defence on being satisfied that the prosecution had proven its *prima facie* case in respect of the charge that was proffered against the appellant. However, our dissenting view was premised on the manner in which the learned trial judge had appreciated the defence of the appellant pertaining to the elements of possession and trafficking at the end of the whole case. The manner as to how the learned trial judge had appreciated the defence can be seen in how he had constructed para. [22] in his grounds of judgment.

[65] Looking at para. [22], we had occasion, during the course of this appeal, to direct the learned DPP's attention to address us on the meaning and import of that paragraph. It was urged upon us, by the learned DPP that the said paragraph encapsulated the learned trial judge's finding of both the crucial elements of possession and trafficking in the charge. We had looked and relooked at the said para. [22] and we could not agree with the learned DPP's conclusion of para. [22], in that the element of trafficking had also been determined by the learned trial judge, as expressed by him in the said para. [22].

[66] That having been said, we agreed nevertheless that *via* para. [22], there was a determination on the element of possession and that the appellant had failed to rebut the same. But to go beyond that in saying that the appellant had also failed to rebut trafficking, would be reading words into that paragraph, where such words were absolutely and conspicuously absent.

[67] In this regard, we could not reiterate enough what learned Justice Mohd Azmi Kamaruddin SCJ had said in the Supreme Court case of *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 ("*Mohd Radhi Yaakob* case") like so:

> *Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on a balance of probability on the evidence the defence has rebutted the statutory presumption of trafficking under s. 37(da) of the Act as a separate exercise even though the Court is satisfied on a balance that the presumption of possession under s. 37(d) of the Act has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.* (emphasis added).

[68] To our minds, an important take-away that can be gleaned from learned Justice Mohd Azmi Kamaruddin's speech in the above-cited case of *Mohd Radhi Yaakob (supra)* has been this. In appropriate cases, upon completion of the defence case in a drug trafficking charge, the trial judge in the course of coming to his decision, must undertake a two-tier exercise in determining whether the prosecution has succeeded in establishing its case against the accused person as per the proffered trafficking charge. In a case where both the presumptions of possession and of trafficking were in play, as was in the *Mohd Radhi Yaakob* case *(supra)*, having heard the accused person's version, it was incumbent upon the trial judge to decide whether the accused person has successfully rebutted both the presumptions that had operated against the accused person. This is where the two-tier exercise that is incumbent on the trial judge to undertake, has to be triggered in the mind of the trial judge, as an integral part of his decision-making process. By that, what is meant is that he must first determine whether the presumption of possession under s. 37(d) of the DDA 1952 has been rebutted by the accused person on the balance of probabilities. If the outcome of that first exercise

turns out to be that the presumption of possession is rebutted, that would be the end of the case. The accused person must be acquitted forthwith. But if the accused person fails to rebut the presumption of possession, that is not, *ipso facto*, the end of the matter. The next step, namely the second step in the exercise that is incumbent upon the trial judge to undertake, would be for him to determine from the evidence adduced, whether the accused person has rebutted the presumption of trafficking (if such presumption applies), also on the balance of probabilities. Only in the event that the accused person has failed to rebut the presumption of trafficking would the trial judge be justified in convicting the accused person on the drug trafficking charge. Nothing short of that would suffice.

[69] To reiterate, the two-tier exercise must be undertaken in appropriate cases because possession and trafficking are offences, distinct and separate, in their own right, attracting different punishments on conviction. It would be gravely erroneous on the part of the trial judge hearing a drug trafficking case to equate a non-rebuttal of the presumption of possession to an *ipso facto* non-rebuttal of the presumption of trafficking, as a matter of course. That would be too far from the truth.

[70] As such, in a charge for drug trafficking under the DDA 1952, at the end of the day, three different results may ensue. First, there may be a full acquittal from the charge, secondly, there may be a conviction on the charge, and thirdly, there may be a conviction for a reduced offence of possession under s. 6 or s. 12 of DDA 1952 (depending on the nature of the drug involved). The third scenario would arise in the event that although the accused failed to rebut the presumption of possession, he nevertheless succeeded in rebutting the presumption of trafficking. Hence, the significance of the two-tier exercise as explained by learned Justice Mohd Azmi Kamaruddin SCJ in the *Mohd Radhi bin Yaakob* case *(supra)*.

[71] In the context of this appeal, it needed to be reiterated that we are on all fours with the majority, on the issue of possession. On the evidence, the learned trial judge was correct in concluding that there was custody or control of the container that contained the impugned drugs attributable to the appellant. He had invoked the presumption of possession under s. 37(d) DDA 1952 in which case the factum of knowledge of the nature of the drugs was also presumed on the part of the appellant. The learned trial judge had later, on evidence, ruled that the appellant had failed to rebut that presumption of possession of the impugned drugs on the balance of probabilities. That having been said, therefore, we were firm in our view that the prosecution had successfully proven the offence of possession against the appellant and we would agree with the learned DPP's submission that the

learned trial judge was correct in finding that the appellant had failed to rebut the presumption of possession on the balance of probabilities. We had no issue with that finding which, to our minds, was amply backed by evidence.

[72] As was alluded to prior, our grave reservation had pertained to the non-consideration of the element of trafficking as a separate exercise. Such a failure by the learned trial judge had precipitated, with respect, in our adverse decision against the conviction for drug trafficking, which for the reasons aforesaid, could not in law be allowed to stand. We would regard such non-direction as amounting to a misdirection on the part of the learned trial judge, which was fatal to the prosecution case for drug trafficking.

[73] Invoking a rebuttable presumption does not put an end to the issue that was being presumed. Rather, it only operates to assist or aid the prosecution but it does not conclusively establish the presumed fact. It is liable to be rebutted, as a presumption under s. 37(d) of the DDA 1952. So as the presumption under s. 37(da) of the DDA 1952. At the end of the case, the trial judge has the statutory duty, as contained under s. 182A of Criminal Procedure Code to consider all the evidence and then come to a decision of whether to convict or to acquit the accused person, by applying the applicable standard of proof. If a rebuttable presumption has been invoked against the accused person in the course of the trial, it becomes the duty of the trial judge to consider whether the evidence adduced by the accused person has succeeded in rebutting that presumption, on the balance of probabilities. And decide he must, otherwise that crucial element in the charge would remain not proved. That duty falls squarely on the shoulders of the trial judge.

[74] We now reproduce the para. [22] in which the learned trial judge had encapsulated his finding.

> [22] In addition, the defence was also unable to rebut the presumption of knowledge under section 37(d) DDA invoked by the prosecution on a balance of probabilities as the amount of the drugs was too huge for self-consumption. Hence, the prosecution had proven its case beyond reasonable doubt against the accused. There was overwhelming evidence that the accused was caught red-handed with the drugs. The prosecution witnesses were neutral and had given credible evidence of what transpired on the material day.

[75] From a literal reading of the said para. [22], it cannot be denied that there was no reference to s. 37(da) DDA and neither was the word 'trafficking' present in the said paragraph, instead, an express reference was made to the phrase 'to rebut the presumption of knowledge under s. 37(d) DDA invoked by the prosecution on the balance of probabilities.'

[76] To our minds, the mischief which the Supreme Court had sought to address in the *Mohd Radhi Yaakob* case *(supra)* has been that the trial court in a drug trafficking case, while considering the defence case at the end of the whole case, must not conclude that just because the accused person has failed to rebut the presumption of possession, it does not follow, as of necessity, that he must also have failed to rebut the presumption of trafficking. We quote the finding of the apex court in the *Mohd Radhi Yaakob* case *(supra)* like so:

> On the issue of trafficking, the learned Judge had failed sufficiently to consider the evidence of defence witnesses, particularly that of DW9 which clearly indicated that on the night in question H was in all probability the trafficker of the cannabis. *The learned Judge had acted on the wrong premise that once the appellant had failed to rebut the presumption of possession under s. 37(d) of the Act, the presumption of trafficking under s. 37(da) of the Act became irrebuttable so as to relieve the Court from the duty to consider separately on a balance of probabilities whether the presumption under s. 37(da) of the Act had been rebutted; this error of law had occasioned a miscarriage of justice* (emphasis added).

[77] In fact, the apex court was again confronted with a similar situation regarding the manner in which the presumptions under s. 37(d) and s. 37(da) DDA 1952 operated, in the case of *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 ("the *Alcontara* case") and the apex bench had this to say:

> Nowhere in his judgment did the Judge direct his attention to the statutory presumptions as to possession in s. 37(d), and trafficking in s. 37(da), and as a result, he made no finding as to whether the defence had rebutted the same. This was a misdirection in law by way of non-direction. *There may well be cases where, because of the absolutely overwhelming nature of the affirmative evidence led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even in such a case, the trial Court should specifically so find.* (emphasis added).

[78] In the course of coming to that conclusion, the apex court had made direct reference to the speech by Justice Mohd Azmi SCJ in the *Mohammad Radhi bin Yaakob (supra)* like so:

> In our view, this was a misdirection in law by way of non-direction having regard to the following passage in the judgment of Azmi SCJ so in *Mohammad Radhi bin Yaakob v. PP* [1991] 1 CLJ Rep 311; [1991] 3 MLJ 169 ...

[79] Clearly, the learned trial judge in this case before us had failed to undertake a separate exercise in determining whether the appellant had created a doubt on the element of trafficking in the charge that was proffered against the latter. Guided as it were by the explicit directions that ought to be followed by a court trying a drug trafficking charge, we were clear in our

minds that the learned trial judge in this case had committed a serious misdirection by way of non-direction. He did not address his mind on the issue of whether the evidence of the appellant had created any reasonable doubt on the element of trafficking by him in the impugned drugs. That omission was therefore fatal to the conviction for the offence of trafficking under s. 39B DDA 1952. Such a conviction could not, in law, be allowed to stand.

[80] To our minds, in any event, it would not matter whether the factum of trafficking was one that was presumed as a matter of invoking the presumption under s. 37(da) DDA or that it was to be proven by the prosecution by way of trafficking as defined under s. 2 of the DDA 1952. (It is worthy of note that in the *Mohammad Radhi bin Yaakob (supra)* the double presumption regime was still applicable.) In essence, that means that in the event that the accused person has failed to rebut the presumed possession under s. 37(d) DDA 1952, the trial judge should not straight away convict him on a charge for drug trafficking. Instead, it is incumbent on him to consider whether on the evidence as adduced by the accused, the latter had created a reasonable doubt in the element of trafficking as defined under s. 2 of the DDA 1952. It is still potentially a two-tier exercise. It will only not entail a two-tier exercise in the event that the accused person succeeds in rebutting the element of possession, whether presumed or by way of direct evidence, because, should that event happen, the whole charge will completely collapse. The issue of the trial judge having to consider whether the element of trafficking was doubtful, has by then been rendered otiose.

[81] It might be argued, quite persuasively, that this process is but a mere procedural requirement. That may be so at first blush, but not all procedural requirements are mere technical formalities. Some have substantive legal consequences as a result of failure to comply. In respect of this case before us, the failure on the part of the learned trial judge to consider the defence evidence pertaining to rebutting the presumption trafficking had amounted to a denial to appreciate a very crucial part of the appellant's defence. First, the statutory law dictates under s. 182A Criminal Procedure Code for the trial judge to consider all the evidence adduced before him at the end of the whole case, by way of proper judicial appreciation of the same. That must necessarily include the evidence adduced by the defence in his quest to extricate himself from the tightening of the grip of the prosecution's case against him. In the context of this case, that must mean evidence adduced to rebut the applicable presumption against him must be considered by the trial judge holistically, with the rest of the evidence, before he can conclude on the question of whether or not the appellant has successfully rebutted the presumption of trafficking against him. Secondly, the appellant's defence was not given the proper judicial appreciation that it lawfully deserved. It is trite

law that the trial judge is obligated to subject the defence evidence, to proper judicial appreciation, however weak the defence may appear. The judgment must sufficiently reflect that such an exercise had indeed been undertaken in that regard. In both instances, the procedure impacts on the substantive rights of the accused person to judicial fair play and substantive justice. In the *cause celebre* of *Browne v. Dunn* [1893] 6 R 67, Lord Halsbury in the English House of Lords, stated the following:

> It seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a particular witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross- examination.

[82] This rule has since become the gold standard, *inter alia*, as to how a cross-examination ought to be managed by counsel. It is not merely a matter of procedure but more importantly, it is also one of substantial justice. It exists to ensure fairness to the witness and to the court in that it gives an opportunity to the witness to put his case in the face of any contradiction which he plans to make to his testimony. Where a party fails to cross-examine a witness of the adverse party on a material point, it is not merely a failure to comply with a rule of procedural technicality but rather, more significantly, it impacted on judicial fair play and substantive justice. See also the speech of Mukarji J in the Calcutta High Court in *A.E.G Carapiet v. A.Y Derderian* 1961 AIR Cal 359.

[83] So too the two-tier exercise must be adhered to by a trial judge hearing a drug trafficking case. The procedure applies regardless of whether a presumption is invoked or not. The essence of the procedure is to ensure that the two crucial elements in the charge are treated as distinct and separate legal requirements that demand separate judicial appreciation by the trial judge. The twin elements of possession and trafficking, although proximate and appearing in the same charge under s. 39B(1) of the DDA 1952, are however not identical. Each need, and deserve to be considered distinctly, in light of the evidence as adduced before the court by the trial judge. Support for this proposition can be readily found in the *Alcontara* case *(supra)* citing with approval the *Mohammad Radhi bin Yaakob* case *(supra)* as could be seen in the preceding paragraphs above.

[84] A failure to comply and adhere to undertake the two-tier exercise in deserving cases in a drug trafficking charge would, to our minds, constitute a serious miscarriage of justice. Justice Edgar Joseph Jr J (as he then was) in the case of *Goo Loo Seng v. PP* [1993] 3 CLJ 1; [1993] 2 MLJ 137 had occasion to state the following, in respect of what would constitute a miscarriage of justice, like so:

> ... the trial judge ... did not view the whole evidence **objectively and from all angles,** with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v. Bundy* 5 Cr. App R270 ... 'the trial was not satisfactory, and the case was not put ... in a way to ensure their due appreciation of the value of the evidence. (emphasis added)

[85] We would respectfully and readily concur with such acute observation. Clearly, in the context of our present appeal, the learned trial judge did not view the evidence from all angles, especially with respect to the element of trafficking, which formed a critical part of the charge which, on conviction would attract the mandatory death penalty. His chance to be acquitted of the trafficking charge had thereby been denied. The appellant deserved a fair trial and a fair trial is one which accords with the dictates of the law. To our minds, that omission by the learned trial judge as alluded to above, had occasioned a serious miscarriage of justice against the appellant.

[86] While we were mindful of the relevant provisions of s. 92(1) of the Courts of Judicature Act 1964, nevertheless this appeal was not, in our respectful view, a fit and proper case, in which we ought to invoke it in favour of the prosecution, in the circumstances obtaining before us.

Conclusion

[87] In the upshot, we had allowed this appeal. As alluded to prior, we had set aside the order of conviction and the death sentence against the appellant for the offence of drug trafficking by the learned trial judge. We had also set aside the decision of the Court of Appeal which had affirmed the said decision of the High Court. In its place, we had entered a conviction for; an offence of possession under s. 12(2) and punishable under s. 39A(2) of the DDA 1952.